

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES**

RED DEVIL AUTO & FLEET REPAIR, LLC

and

**Cases 28-CA-146421
28-CA-152886**

ROBERT KAMALO, an Individual

*Chris J. Doyle, Esq. and Alexander J. Gancayco, Esq.,
for the General Counsel.
Jeffrey W. Toppel, Esq., of Jackson Lewis, P.C.,
for the Respondent.*

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Phoenix, Arizona on July 21 and July 22, 2015. Robert Kamalo, an individual, (the Charging Party or Kamalo), filed the original charge in Case 28-CA-146421 on February 13, 2015, and the second charge on May 26, 2014, in case 28-CA-152886.¹ The General Counsel issued the original complaint on April 30 and amended it with a consolidated complaint (complaint) in this case on June 18, and the Respondent answered the complaint on July 10 generally denying the critical allegations of the complaint.

This case involves the Respondent's sudden discharge of the Charging Party on February 12 after discussions were had between the Charging Party and his coworkers concerning Respondent's delayed payment of earned wages and Charging Party's suggestion that the group of employees contact the Board for assistance. The Respondent denies that these employee discussions had anything to do with its discharge of the Charging Party.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following.

¹ All dates in 2015 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

5 The Respondent, a limited liability company with an office and place of business in Surprise, Arizona, has been engaged in the service and repair of heavy duty trucks and automobiles continuously since 2006 through at least February 12. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Transcript at 10, 244–250; General Counsel Exhibit 6.)²

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

10 Respondent services and repairs heavy duty diesel trucks and trailers as well as automobiles and it employed three mechanics, a customer service agent, and parts runner at all material times in this case from approximately November 2014, through February 12. The work extended from minor auto and truck repairs to major engine overhauls. For example, Respondent had inspection work from the Arizona Department of Transportation but could also
15 provide a full transmission rebuilt or replacement. (Tr. 148.) Respondent would also make truck, trailer, and auto shock absorber, suspension, and air conditioning repairs.

Respondent is owned and managed by Jayson Finch (Finch) and his wife Erika. Finch is Respondent's primary mechanic but Respondent also employed Mark McAllister (McAllister) and Cliff McNamara (McNamara) as mechanics in late 2014 and early 2015.

20 Kevin Melvin (Melvin) was also employed by Respondent since 2011, and acted as an agent for Respondent in Finch's absence and worked as a service contract writer and customer service representative on a daily basis. (Tr. 76–77.) Melvin was Finch's "second hand man" and handled all employee matters in Finch's absence including answering calls or texts into work for missed days, late arrivals or early dismissals on a regular basis. Melvin would notify Finch of
25 employees' divergence from the 8–5 schedule. (Tr. 36–37, 80, 143.) Finch admitted that Melvin works as a supervisor in Finch's absence and Melvin takes over all of Finch's responsibilities including assigning employees work tasks but Melvin did no hiring and firing of employees. (Tr. 37, 144.) Melvin would also communicate to employees whenever Finch instructed Melvin to let employees go home early. (Tr. 81.) Finch also instructed employees to contact Melvin first
30 with time and attendance issues and only contact Finch if an employee received no response from Melvin. (Tr. 144.)

Respondent retained the services of OneSource Employer Services, a payroll accounting service, who recorded employees hours and pay from timecards submitted at Respondent. Employees were generally paid as hourly employees and they received their paychecks either at

² Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief and "R Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

midnight on Fridays via direct deposit into their bank account or delivery by Respondent's check-writing service's check on Fridays at work or through the mail.

B. Kamalo's General Employment with Respondent

5 Kamalo interviewed with Finch for the parts runner position by shadowing him from October 22, 2014, for a "working interview." (Tr. 141.) Kamalo's paid employment began with Respondent on November 3 or November 4, 2014, and continued through February 12 the following year. (Tr. 142, 172, 195.) Kamalo worked 8-hour workdays Mondays through Fridays from 8 a.m. to 5 p.m. with an hour lunch break as a parts runner and shop cleaner. Most times, he was paid hourly and received his paycheck on a weekly basis for the most part and had his
10 weekly paycheck directly deposited into his bank account each Friday at midnight. (Tr. 149, 254.)

Kamalo was hired by Respondent as a parts runner and shop and tool cleaner, and he performed a variety of odd jobs when needed throughout his employment. Kamalo opined that most of the parts he was sent to pick up for Respondent were in the price range of \$50-\$200
15 each and that he rarely picked up parts costing more than \$1000. (Tr. 145.) Kamalo would pay for the parts in a variety of ways including by Respondent's check, Respondent's credit card, and Respondent's account being charged at a parts store with Respondent's credit card being on file. Id.

20 Kamalo missed time from work at Respondent for a variety of reasons including two incidents involving his step-son, he hurt his foot and missed some time, and his fiancé was ill and required hospitalization over the holidays in 2014. This missed work resulted in Kamalo not being available to work at Respondent and Kamalo not being paid for these same missed hours. Kamalo returned to work on January 5 and worked his position as parts runner and shop cleaner until February 12. (Tr. 180.)

25 During his entire employment at Respondent, Kamalo worked the following hours and though he occasionally spoke to Finch about missing work, Kamalo received no discipline or warnings from Respondent for his work attendance or work performance:

	<u>Week</u>	<u>Dates Worked</u>	<u>Hours Worked</u>	<u>OT Hrs. Wrkd</u>	<u>Payment Date</u>
	1	11/3 – 11/7	39.33	-	11/14/14
30	2	11/10 – 11/14	37.33	-	11/21/14
	3	11/17 – 11/21	39.04	-	11/28/14
	4	11/24 – 11/28 ³	25.5	-	12/5/14
	5	12/1 – 12/5	34.50	-	12/12/14
	6	12/8 – 12/12	40	1.0	12/19/14
35	7	12/15 – 12/19	12.83	-	12/26/14
	8	12/22 – 12/26 ⁴		<i>no work due to fiancé hospitalization</i>	
	9	12/29 – 1/2 ⁵		<i>no work due to fiancé hospitalization</i>	
	10	1/5 – 1/9	40	1.08	1/16/15

³ Thanksgiving 2014 week.

⁴ Christmas 2014 week.

⁵ New Year's 2015 week.

11	1/12 – 1/16	35.75	-	2/6/15
12	1/19 – 1/23	37	-	2/6/15
13	1/26 – 1/30	38	-	2/6/15
14	2/2 – 2/6	31	-	2/13/15
5 15	2/9 – 2/12	8.5	-	2/20/15

(GC Exh. 2.)

As stated above, Kamalo was only paid for hours actually worked and he did not receive any paid time off for sick leave or vacation. (Tr. 196.) He earned \$9 per hour and time and one-half or \$14.50 per overtime hours worked over 40 hours per week. Kamalo missed 2 entire weeks over the 2014 Christmas and New Year’s holidays due to his fiancé’s hospitalization and the fact that it was a slow time for Respondent due to the holidays and Finch did not voice any objection to Kamalo taking this unpaid time away from work. (Tr. 179, 196, 198, 272.) Melvin and Finch responded to the December absences due to Kamalo’s fiancé’s illness by telling him “just keep us updated.” Id. In fact, Finch often told Melvin that it was okay for Kamalo to take unpaid time off work. (Tr. 54.)

As a parts runner, Kamalo’s duties included driving a Respondent vehicle and using Respondent’s credit card for gas for the vehicle to a variety of parts locations around the general Phoenix area including Genuine Parts Co. d/b/a NAPA Auto Parts, Arizona Brake & Clutch Supply, Inc., FleetPride, Inc., Freightliner of Arizona, LLC d/b/a Freightliner of Arizona, Inland Kenworth, Inc., Lubrication Equipment & Supply Co. d/b/a The Hose Advantage Store, Rush Truck Centers of Arizona, Inc., RWC Int’l, Ltd d/b/a RWC Group, and Don Sanderson Ford, Inc., d/b/a Sanderson Ford. Kamalo would retrieve parts from these locations on an as needed basis with instructions from Finch or Melvin. Kamalo opined that his parts runner duties took him to retrieve parts approximately 3–4 times per day. (Tr. 146, 267.) When Kamalo was not retrieving parts, he was assigned to clean the shop, weed the outer perimeter, or clean mechanic’s tools. Kamalo occasionally used his own personal automobile when Respondent’s vehicle was unavailable. (Tr. 184.)

C. Respondent’s Lax Personnel Policies from Late 2014 to Feb. 12, 2015

In late 2014 and early 2015, Finch ran Respondent informally without written rules or any formal personnel policy handbook for handling employment problems concerning time and attendance, cellphone use, or employee discipline. (Tr. 253–256.) Instead, Finch opined that he ran his small business like a family and held employees accountable like he would his family. Finch shared that he does not write up his children for bad behavior and also did not write up Respondent’s employees in 2014–2015. (Tr. 27–28.)

Respondent had no policy regarding employee discipline and never issued anything in writing that could be considered disciplinary in nature in later 2014 or early 2015. (Tr. 255–256.) Finch as Respondent’s owner wore all hats for Respondent and admits that he did not have enough time in late 2014 or early 2015 to take care of managing employees or having a disciplinary policy that was followed. (Tr. 255.) At no time did Respondent have any work policy that said that employees would be disciplined if they did not work 40 hours in a week.

Also, Finch never warned any employee that they would be terminated if they continued to miss work. (Tr. 52.) There was never any policy about employees' use of cellphones at Respondent in 2014–2015. (Tr. 61.)

Finch admits that from late 2014 through early 2015, all of Respondent's employees including Finch and his wife had work performance problems including, but not limited to, missed work, use of cellphones for personal matters during work hours, and employees occasionally repairing vehicles poorly. (Tr. 182, 233, 257, 277–278.) Finch reported that McAllister had personal problems at home and that McAllister would come into work late or he would leave early. (Tr. 69.) Finch also reported that McNamara too would often arrive to work late and leave work before he had worked 8 hours during a workday during Kamalo's employment at Respondent. (Tr. 69, 86.) Kamalo was a no-show for work approximately 6–7 times during his employment at Respondent and he did not communicate with Melvin ahead of his absences. (Tr. 82.) In addition, McAllister had family in California and he had 2 unexplained days off during the time that Kamalo worked at Respondent. Id.

Finch complained that both McNamara and Kamalo would always use their cellphones at work for personal matters but at no time did Respondent discipline any of its employees in writing or in any other formal manner for any work performance issue in late 2014 or early 2015. Finch listed McNamara's excessive absences, excessive time off, repair reworks, and inconsistent overall work quality as McNamara's bad work habits. (Tr. 263–264.)

Finch would occasionally verbally discuss these work performance issues but he did not take any official disciplinary actions. For example in early January, Finch was upset and told Kamalo that he needed to better prioritize his work tasks as Finch found Kamalo helping McAllister with a transmission problem in the yard. (Tr. 173–174, 204.) Kamalo explained to Finch that Melvin had given Kamalo the work assignment to help McAllister pull a transmission as they needed to get the pulled transmission to the Gear Shop. (Tr. 174.)

In a couple of instances involving work performed by mechanic McAllister and not Kamalo, Respondent was required to redo shoddy work at Respondent's own significant extra costs which eventually interfered with Respondent's cash flow to the point that Respondent did not pay its employees their regular Friday paychecks on time from 1/23 until 2/6/15, or a period of 2 weeks. (Tr. 73, 207, 209, 233–234, 259–262, 273, 277–278; R. Br. at 8.)

In January, Finch called an employee meeting to emphasize the need for better quality control with vehicle repairs. Id. In at least two incidents involving mechanic McAllister and not Kamalo, Finch complained to mechanics about poor work quality in repairing a truck that had lost its wheels due to a faulty repair in January 2015, and later that same month McAllister also failed to properly repair a truck as he forgot to put an essential part back on that allowed the truck to dump its load in Prescott, Arizona. Id. Later in January, Finch told the employees that when they do poor work, they are taking food from his table. Id. McAllister was never disciplined by Respondent for poor work performance and remained employed at Respondent through at least the middle of April more than 2 months after Kamalo was terminated. (Tr. 259.) McNamara remained employed as a mechanic with Respondent until he decided to quit in mid-May. (Tr. 263–264.)

D. Employees Complained About Respondent's Delayed Wage Payments

At some point on or after January 23, without any advance warning⁶, Respondent's employees' paychecks were not paid on time and there was a 2-week delay in Respondent's payment of earned wages from January 23 to February 6. (Tr. 150, 210–211, 215; GC Exh. 2.)

5 At approximately, 8 a.m. on January 23, Kamalo first notified Melvin that he had not received his paycheck as usual via direct deposit. Melvin responded by telling Kamalo to notify Finch about his delayed paycheck.⁷ (Tr. 150.)

Also on January 23 at approximately 11 a.m., Kamalo spoke to Finch about not receiving his paycheck on time and if Finch knew what was going on about his delayed paycheck. (Tr. 10 153.) Finch told Kamalo that Finch had been looking for Kamalo the day before to notify him that paychecks would be delayed as there was a holdup as to disbursing paychecks to all employees as Finch said that he was waiting on one of his customers to pay their bill and that as soon as the customer paid his bill, Finch would be paying Respondent's employees their paychecks. (Tr. 153.) Later that same day, Finch further informed Kamalo that as soon as more 15 money came into Respondent, Finch would notify the employees as to when Respondent would pay them their delayed compensation. (Tr. 52.) Kamalo credibly disputes that Finch waited around to inform him that delayed paychecks were coming as Kamalo knew that he and Melvin were at Respondent when Finch left for the day without any notice to him that paychecks were being delayed. (Tr. 219.)

20 On January 28 at approximately 8 a.m., Kamalo spoke to McAllister and McNamara in the bay at the shop. Kamalo notified his coworkers that his January 23 paycheck was delayed and had not been deposited into his bank account. (Tr. 154.) Kamalo asked them if they were aware if they had been paid their January 23 paychecks yet and they responded by saying that neither one of them had been paid either. *Id.*

25 Kamalo asked McAllister and McNamara whether Finch had any new information about their delayed paychecks or whether Finch had told them anything about their delayed paychecks and when payment could be expected. (Tr. 154.) They told Kamalo that they had not heard anything from Finch as to when they could expect to receive their delayed paychecks. The three employees then discussed among themselves how frustrating it was for them not receiving 30 advance notice from Respondent first that their paychecks would be delayed and then having no information as to how long the delay would last and when they would receive their delayed paychecks. (Tr. 154, 219–221, 235.)

Kamalo then suggested that maybe they all talk to somebody regarding their delayed paychecks. *Id.* Kamalo further suggested that the three of them should talk to somebody at the

⁶ Kamalo disputes Finch's testimony that Finch went looking for Kamalo on 1/22 to inform him of the upcoming delayed paycheck due to financial problems. Kamalo confidently without hesitation testified that he was present at Respondent with Melvin late in the day on 1/22/15, and that Finch went home without ever informing Kamalo that he would not receive his paycheck on time the next day. Tr. 210–215, 217–219.

⁷ At hearing, Kamalo forgot about when he first spoke to McAllister and McNamara regarding not receiving his delayed paycheck on January 23. I find that Kamalo first spoke to McAllister and McNamara about their delayed paychecks the following week on January 28 as Kamalo's February 19 affidavit contains more reliable facts that both McAllister and McNamara were not present at Respondent on January 23 as they were out sick that day. Tr. 213–216, 219.

Labor Board or whoever it may be at that time to figure out what rights they had because they were not receiving any communication about the status of their pay from Respondent. Id.

McAllister and McNamara nodded their heads in agreement with being frustrated with Respondent and with Kamalo's suggestion that they seek outside help to improve their delayed paycheck situation but it also appeared to Kamalo that neither McAllister nor McNamara wanted to "rock the boat" with Finch. (Tr. 154–155, 235.) At this point, all three decided to wait a little longer to see if they would hear something more definite from Finch as to when they would receive their delayed paychecks since at that time it was only Wednesday and the paychecks delivery had been delayed only 5 calendar days. Id.

Sometime between the end of January and the beginning of February before February 6, Kamalo contacted a friend and asked which government agency would be best to assist Kamalo and his coworkers in obtaining their unpaid backpay and Kamalo's friend gave Kamalo the telephone number of the National Labor Relations Board Region 28 General Counsel's Office. (Tr. 220–221.)

Kamalo did not receive his January 30 paycheck on time either. (Tr. 155.) Kamalo spoke to McAllister and McNamara in the morning on January 30, and he informed them that in addition to his January 23 paycheck, his January 30 paycheck was also not paid on time. (Tr. 155–156.) Kamalo asked his coworkers, McAllister and McNamara, whether they had heard anything about when they would receive their delayed wages and they said they had not heard anything about "our" pay at that time. Kamalo responded by telling his coworkers that he would talk to Finch as soon as he saw him about their late pay and when they would get paid. Id.

Later in the morning on January 30, at the front gates of Respondent's yard, Kamalo asked Finch if he had anything to report in regards to the employees' delayed paychecks as Kamalo told Finch that "we" have bills piling up at that time and that Kamalo and his coworkers were wondering about the status for getting paid their delayed paychecks. (Tr. 156.) Finch told him that Respondent was still waiting to receive funds from Respondent's customers for work performed and that he was still waiting to hear from his customer that owed Respondent money for jobs that had been completed. Id. Finch also told Kamalo that he was waiting for one check from a customer to possibly give Kamalo and his coworkers a small advance toward what Respondent owed in delayed paychecks and that Finch would let employees know as soon as he heard about the check from a customer. Id.

After speaking to Finch, Kamalo saw McAllister and told him what Finch had told him earlier on January 30, about a possible small advance but no definite date for payment of delayed paychecks had been mentioned by Finch. (Tr. 157.) Kamalo expressed his disappointment to McAllister as to how the situation for payment of delayed paychecks was being handled by Finch and Respondent. Kamalo repeated to McAllister that he was interested in talking with the Labor Board because nothing seemed to be getting done at Respondent regarding payment of their delayed paychecks. In response, McAllister also appeared disappointed at hearing from Kamalo that there was still no definite date as to when employees could expect to be paid their delayed paychecks. (Tr. 158.) Kamalo observed that McAllister's body language showed that McAllister was also disappointed by the uncertainty of payment of delayed paychecks as he "had his head down and he was nodding his head in regards to when I [Kamalo] was talking about being upset about no communication within -- within us about our pay not being issued." Id.

Kamalo further opined that McAllister still acted like he did not want to rock the boat too much at Respondent as the two got ready to go to lunch. *Id.*

Later on January 30, Finch gave Kamalo, Melvin, McAllister, and McNamara what he called a \$250 cash advance toward their delayed paychecks and Finch took them all out to lunch at Burger King. (Tr. 158–159.) At the end of lunch, Finch told his employees that he was trying to figure out how to get all of them paid their delayed paychecks and that he was still waiting to receive income from customers and that Respondent could only afford \$250 each employee at that time. *Id.*

On approximately February 2 or February 3, after Kamalo had been employed for more than 90 days with Respondent, Kamalo spoke to Finch and inquired about the delayed paychecks and told Finch that he needed to pay bills with monies owed to him by Respondent. (Tr. 159.) Finch responded to Kamalo saying that he did not hear anything else about checks coming into Respondent from customers, that he was still waiting to get paid by customers, and that there was nothing that Finch could do about the delayed paychecks at that time because Finch and Respondent did not have any monies on hand to pay any of Respondent's employees. (Tr. 53, 159.)

At this same time, Kamalo, McAllister, and McNamara were talking among themselves about unpaid bills and their needs for their delayed paychecks as McAllister had broken a tooth and needed dental work and Kamalo and McNamara needed to pay their monthly rents. (Tr. 160–161.)

On February 5, Kamalo received more than one email from Respondent's payroll service containing electronic pay stubs at 7:30 a.m. prior to his workday. (Tr. 161.) When he arrived at work at 8 a.m. later that day, Kamalo discussed with McAllister that he had received the multiple emails from the payroll service and Kamalo told McAllister that their delayed paychecks were possibly on their way to all Respondent's employees and that Kamalo hoped this was true as Finch had not informed them pay would be there on February 6. (Tr. 161–162.) McAllister and Kamalo also informed McNamara later that day that they might be paid soon. (Tr. 162.)

On February 6, Respondent finally paid its employees their 2-week delayed paychecks as well as their current paycheck for the week of 1/30. (Tr. 163.) Therefore on February 6, Respondent paid its employees 3 weeks of wages—2 weeks being late and 1 week being paid on time less the \$250 each in cash advances. (Tr. 224–225.)

On Monday, February 9, Kamalo called Melvin to report that he would be late coming to work due to his son's illness and his need to find a last minute baby sitter. Melvin communicated this to Finch who communicated to Kamalo through Melvin that it was okay with Finch if Kamalo wanted to take the entire day off to care for his son. (Tr. 163–165, 226; GC Exh. 5.)

On February 10, Finch conducted a meeting late in the day at approximately 4:30 or 4:45 p.m. with all Respondent's employees and notified them that the following day, February 11, Respondent had no work for employees and for them to take the day off and that if anything changed, Finch would call them in. (Tr. 165–166, 226.)

*E. Finch’s 2/12/15 Meeting with Kamalo Leading to Kamalo’s Termination
from Respondent*

On February 12, Kamalo reported to work at 8 a.m. (Tr. 167.) Finch arrived at approximately 8:30 a.m. and at 9 a.m. Finch called Kamalo into his private office trailer at Respondent for a short 5-minute discussion. (Tr. 167–169.)

Kamalo described the discussion as Finch seeming upset, angry, and tense and telling Kamalo that he had an issue—that other employees were notifying him [Finch] about Kamalo going to go to the Labor Board if Kamalo did not receive the pay that was owed to him. (Tr. 170–171, 185, 227–228.) Finch admits to questioning Kamalo why Respondent’s other employees had come up to Finch telling him that Kamalo had said that he planned to go to the Labor Board about not getting paid on time? (Tr. 66, 170.) Finch also recalled telling Kamalo on February 12 after his Labor Board question to Kamalo that “if we were a work family, how were we going to work through this if you don’t come and talk with me” first? (Tr. 66.) Finch also admits that he further asked Kamalo “why he [Kamalo] needed to go to the Labor Board and what the Labor Board thing was about?” Id.

Kamalo responded to Finch’s question in an “even mannered” tone of voice saying that he was not going to lie to Finch and added: “yes, I was upset that you had not paid us and yes, I was going to go to the Labor Board to see what our rights were as employees for not getting paid.” (Tr. 170–171, 229.) Kamalo further told Finch that he was disappointed due to the lack of communication from Finch and how many times he had to go back and ask Finch about the delayed paychecks and that all the employees were upset that they were not being notified about anything concerning the delayed paychecks. Id.

Finch responded in a serious and stern manner while sitting on his stool that despite the mention by employees of unpaid bills to Finch when their paychecks were delayed, Finch told him that Kamalo and the other employees have no idea what real bills look like and that Kamalo’s “little bills” did not compare to Finch’s more significant bills and that if Kamalo wanted to see Finch’s bills, Finch would show Kamalo what true bills looked like. (Tr. 170–171, 229.) Kamalo responded by saying that Finch’s personal bills were none of Kamalo’s business due to the fact that Finch and Respondent were Kamalo’s employer and Kamalo was the employee. (Tr. 171.) Finch responded by repeating that Kamalo’s minor problems that were going on in Kamalo’s little world paled in comparison to Finch’s much larger problems at Respondent. (Tr. 172.)

Finch next told Kamalo that Finch no longer needed Kamalo’s services, Kamalo was terminated, and that he should turn in his uniform. (Tr. 172.)

After leaving his trailer meeting with Finch, Kamalo approached McAllister who asked Kamalo “What’s up?” (Tr. 173.) Kamalo responded to McAllister: “I’m out of here, see you later.” Id.

Kamalo left Respondent and later that day he called the National Labor Relations Board Region 28 General Counsel’s office in Phoenix, Arizona, and he recounted what had happened at Respondent leading up to his termination earlier that day. (Tr. 175, 221.) A charge was filed the following day.

At no time during this discussion between Kamalo and Finch on February 12, did Finch ever mention Kamalo's work performance nor did Finch mention any problems with Kamalo talking on his cellphone too much while at Respondent. (Tr. 172, 236.) Kamalo denies that he became aggressive with Finch on February 12, and maintains that he acted "perfectly fine, calm" at this time.⁸ (Tr. 172–173.) In addition, Finch never spoke to Kamalo about either coming into work late or leaving work early being a problem or any other work performance issue that bothered Finch. (Tr. 176.)

One of Finch's versions of what occurred on February 12, is that at some point during the morning of February 12, Finch met with Kamalo and Kamalo made it clear to Finch that Kamalo did not want to work at Respondent that day because he had personal legal matters that he needed to attend. In response, Finch testified that he told Kamalo that Kamalo could go home to address these legal matters but that instead of clocking off work and going home, Kamalo remained on the clock and texted someone with his cellphone for well over an hour. At this point, Finch says that he finally decided to discharge Kamalo. (Tr. 28.)

Another version from Finch about Kamalo's last day at Respondent on February 12, is that Finch decided to terminate Kamalo from Respondent due to: (1) Kamalo's work performance; (2) Kamalo's work history; and (3) Kamalo's becoming aggressive to Finch in their February 12 discussion. (Tr. 56–57.)

With respect to work performance, Finch opined that Kamalo would take too long to clean Finch's tools as work that would normally take Finch's 2 sons an hour each to complete took Kamalo 3 days to complete. In addition, beginning in 2015, Kamalo's work performance began to fail in a number of areas beyond cleaning tools. For example, according to Finch, by the time February 12 rolled around, it was taking Kamalo 1 hour to pick up a part from Freightliner where previously it took 30 minutes for Kamalo to pick up the same part in 2014. Finally, according to Finch, Kamalo developed a bad work attitude in 2015, which Finch opined also brought other employees' attitudes down in the shop. For example, Kamalo would typically clean a part according to Finch, text someone, clean a part, and call someone outside work like his son or his lawyer, clean a part and send an email and other employees would see this in 2015, and it dragged down morale. (Tr. 56–60.) Melvin testified that Kamalo's work performance started out okay but later in 2015, became less productive and Kamalo appeared distracted by personal matters at home. (Tr. 84–85.)

Finch admits that he never formally disciplined or issued written warnings to Kamalo for any work performance issued in 2015, but that he would speak to Kamalo directly about any problems he had with Kamalo's work performance. (Tr. 61.) Finch also admitted that during Kamalo's employment at Respondent, all of the other employees also had work performance problems. (Tr. 68–69, 72, 86.) Finch says that he never formally disciplined or issued written warnings to other Respondent employees and Respondent did not terminate McNamara or McAllister at the time that Finch terminated Kamalo. (Tr. 72.)

⁸ Kamalo also credibly denied becoming upset, filing bankruptcy, contacting the Labor Board, or receiving process of court documents from a process server at any time *prior* to being terminated on February 12. Tr. 200–201.

Finch did not discipline or terminate any other employee that same day for work performance issues of any kind despite McAllister's shoddy repair work that Respondent was required to redo at its own labor time and parts cost. In addition, Finch did not discipline or terminate any other employee on February 12, such as McNamara or McAllister for missing work, showing up late or leaving early or using their cellphone for personal matters while at work.

With respect to work history, Finch points to Respondent's time and attendance records in support of his claim that Kamalo did not work 40-hour workweeks. (Tr. 62; GC Exh. 2.) Finch stated that he first talked to Kamalo about working 40 hours per week on November 14, 2014. (Tr. 63.) Finch admitted, however, that he would send Kamalo and others home if Respondent did not have enough work in the shop that day. Finch also admitted that he would also send mechanics McAllister and/or McNamara home with less than 8 hours work in a day if there was not enough work to service. (Tr. 65.) Finch also admits that he sent Respondent employees home before they worked an 8-hour day due to bad weather at times in 2014–2015, as the mechanic and Kamalo worked outside at Respondent's yard facility. (Tr. 65.) I find that Respondent's practice of sending employees home before they have worked a full 8-hour day at least partially explains why in at least 8 weeks that Kamalo worked he did not reach 40 hours though he reached over 30 hours. (Tr. 64–65; GC Exh. 2.)

Finally, with respect to Finch's opinion that Kamalo got aggressive with him on February 12, Finch explained that it started when Finch admitted that he told Kamalo that "if he [Kamalo] had bigger problems, then his [Kamalo's] services were no longer needed." (Tr. 66, 172.) Next Finch admits that he discharged Kamalo in part because he "became" aggressive, and later clarifying that this characterization referred to Kamalo's "using the Labor Board as a threat to me." (Tr. 66–67.) As referenced above, Finch began the conversation that morning asking Kamalo about his statement to other employees suggesting that the employees go to the Labor Board if paychecks are delayed. Kamalo's version of the February 12 conversation is much more believable given my observation of both witnesses at hearing and Finch's concurring testimony that he first raised the Labor Board issue with Kamalo.

In sum, Finch's version of the underlying facts as to what occurred on February 12, is rejected as unreliable and changing as to his explanations for terminating Kamalo. I find that Finch was upset that he heard that Kamalo had threatened to go to the Labor Board if Respondent continued to delay employee paychecks and Finch fired Kamalo for this alone. Finch created his own problem of employees not working 40 hours a week by not having enough work to keep employees fully employed and because his facility was not protected from the elements including bad weather. All employees had the same or worse work performance issues as Kamalo but only Kamalo mentioned going to the Labor Board to help the group of employees in receiving backpay or simply insisting that weekly paychecks be paid to employees on time. Finch never bothered to discipline any employee in response to any alleged bad work performances. Finch and not Kamalo became upset on February 12, when Kamalo did not simply agree when Finch told him that his employees, who Finch views the same as family members, should come to him directly with work problems such as delayed paychecks rather than seek assistance from the Board.

ANALYSIS

I. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

Kamalo testified in a direct and forthright manner and his testimony did not waver on cross-examination. For example, Kamalo's testimony was more believable that Finch did not keep Respondent's employees informed in early 2015, that their paychecks would be delayed from January 23, through February 6, except for direct questions that Kamalo asked Finch when he occasionally saw him at work. Finch's statement that he kept Respondent's employees informed during this time period of financial difficulties and status of delayed paychecks is not credible nor is Finch's statements that because of McAllister's shoddy repair work in January, all employees should have known or somehow assumed that paychecks would be delayed. (Tr. 278.) There is no evidence presented to support a finding that Respondent's employees were aware of Finch's net worth or ability to withstand financial problems in early 2015.

I also reject as self-serving, Finch's statement that he knew Kamalo was experiencing financial problems so Finch helped Kamalo by giving him a cash advance of \$250 on January 30. (Tr. 279.) I find that all Respondent's employees were experiencing financial problems from delayed paychecks as they were given no advance warning of the delayed paychecks and needed to pay their weekly rent and other bills.⁹

I also reject Finch's testimony that Kamalo was aggressive with him on February 10 and that Finch told only Kamalo to take the next day February 11, off allegedly due to his aggressive tone and Kamalo needing to figure out how to handle a process server at his house. (Tr. 280–281.) Neither Melvin's testimony nor Respondent's time and attendance records showing that other employees worked on February 11, were produced at hearing to confirm Finch's statements here and Kamalo was quite convincing that the reason Finch called a meeting on February 10, at the end of the day was to announce to all employees that on Wednesday, February 11, Respondent had no work for all employees and for them to take the day off and if for some reason Finch had any new business to handle and he needed to call-in an employee on February 11, he would call them as needed because there was not enough work on February 11. (Tr. 166–167.)

Finally, I reject Finch's statements concerning the purpose of his February 12 meeting with Kamalo, the February 12 discussion, and his changing reasons for terminating Kamalo as

⁹ At Kamalo's hourly rate of \$9, it is reasonable to presume that he and probably other Respondent employees relied on receiving a weekly paycheck and lived paycheck-to-paycheck and would suffer severe financial problems connected with a sudden unannounced paycheck delay of 2 weeks.

untrue, inconsistent with Kamalo’s more believable testimony, and unsupported by the record. Finch states that he met with Kamalo to discuss Kamalo’s outburst and disrespect toward him on February 10 apparently in the presence of all other Respondent employees including Melvin who did not confirm a February 10 outburst at work by Kamalo. (Tr. 283–286.) I further find it telling that Finch apparently told Kamalo that one reason he was being terminated was because Kamalo only thought of his own bills and focused entirely on himself and therefore was not a company/family member-like employee that Finch preferred. (Tr. 285–286.) Consequently, even at hearing, several months after Kamalo’s termination, Finch failed to see any fault with an employee’s delayed paycheck if business conditions warranted such a delay because at Respondent, if the owner does not have enough business and cash flow to pay its employees earned wages in a timely manner, Finch believed that each employee should take one for the company, incur backpay without accrued interest, and not complain about delayed paychecks or threaten or actually go to the Board for assistance else be subject to termination for not being a company/family-member employee.

II. On January 28 and January 30, 2015, Kamalo Engaged in Protected Concerted Activity for the Purpose of Mutual Aid and Protection by Seeking the Assistance or Support of Co-Workers McAllister and/or McNamara About Delayed Paychecks and About the Possibility of Complaining Directly to Respondent or Pursuing Remedies at the Board

A. Protected Concerted Actions

Complaint paragraph 4(a) alleges that from about January 23, 2015, through about February 12, 2015, Respondent’s employee Kamalo engaged in concerted activities with other employees for the purposes of mutual aid and protection, by, among other ways, raising with Respondent and discussing among themselves about wages, paycheck delays, and the possibility of going to and pursuing remedies through the Board.

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 at p. 3 (2014). Although these elements are closely related, precedent makes clear that they are analytically distinct. See *Summit Regional Medical Center*, 357 NLRB No. 134, slip op. at 3 (2011). Whether an employee’s activity is “concerted” depends on the manner in which the employee’s actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that “[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *NLRB v. City Disposal Systems*, 465 U.S. at 835. The concept of “mutual aid or protection” focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

In *Meyers I*, the Board defined concerted activity as that which is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

Meyers I, 268 NLRB at 497. In *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity includes cases “where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers II*, 281 NLRB at 887. The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In this regard, “inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.” *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In addition, it is well established that “the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.” *Whittaker Corp.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

It is well established that wage discussions are “inherently concerted.” *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). Here, Kamalo sought his coworkers’ assistance in eliciting group concerns or action in obtaining more information from Respondent as to when they could expect to receive their delayed paychecks and possibly seeking outside assistance with the Labor Board to get paid as the delay continued. This involved Kamalo’s communications with his coworkers with a concerted plan of action of approaching Finch for more information as to when they would receive their delayed paychecks or going to the Labor Board for assistance in getting the backpay owed by Respondent. Even under *Myers II*, and its progeny, Kamalo’s conduct in approaching his coworkers on January 28, and January 30, to seek their support of his efforts regarding this shared workplace concern would constitute concerted activity. See Tr. 154–158, 219–221, 235. It is irrelevant that Kamalo’s coworkers did not expressly join in his efforts to hasten payment of their delayed paychecks either by going directly to Respondent or to the Labor Board although it is apparent that at least one of these coworkers either spoke to Melvin who relayed a message to Finch or spoke directly to Finch and communicated the discussions that were had on January 28, and January 30, wherein the employees considered going to the Labor Board if their paychecks continued to be delayed or were delayed in the future. Solicited employees do not have to agree with the soliciting employee or join that employee’s cause in order for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp.*, 305 NLRB at 933; *Whittaker Corp.*, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB at 1117. Nor do the solicited employees have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. See *El Gran Combo*, 284 NLRB at 1117; and *Hintze Contracting Co.*, 236 NLRB 45, 48 (1978), enfd. mem. 1979 WL 32447 (9th Cir. 1979). Further, the protected, concerted nature of an employee’s complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

Having found that Kamalo’s discussions with his coworkers on January 28, and January 30, were concerted activities based on the totality of the record evidence, I now turn to the issue of whether Kamalo’s concerted activities were engaged in for the purpose of “mutual

aid or protection” under Section 7 of the Act. The Board has expanded the scope of this provision as follows:

We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity.

Fresh & Easy Neighborhood Market, Inc., *supra* at p.7.

In this case, I find that Kamalo’s action was for the purpose of mutual aid or protection under Section 7 of the Act by seeking the assistance and support of coworkers McAllister and McNamara on January 28, and January 30, in their discussions that raised their shared delayed paycheck complaint and sought to bring this complaint directly to Finch as Respondent or to the Labor Board as an outside entity for assistance. In addition, since all of the employees had delayed paychecks, Respondent through Finch had reason to know that more than a single employee was involved when Finch confronted Kamalo about Kamalo’s discussion with his coworkers on February 12, 2015.

B. Kamalo’s Threat to Take the Group Complaint of Delayed Paychecks to the Labor Board Is Protected and Adequate Under the Circumstances of This Case to Mean the National Labor Relations Board, and, in Particular, Region 28 in Phoenix, AZ

Respondent argues that even if Kamalo told his coworkers that he might seek assistance from the Labor Board if Respondent continued its practice of delaying paychecks and that Respondent later interrogated and discharged Kamalo for this statement, neither interrogation nor discharge for such reason are violations of Sections 8(a)(1) or 8(a)(4) of the Act because those sections do not extend protection to employees who resort to or threaten to resort to any agency other than the Board. (R. Br. at 17–19, 25–26.)

Respondent’s argument improperly relies on the decision in *Inked Ribbon Corp.*, 241 NLRB 7, 13 (1979). That case is factually distinguishable from the facts in this case. In *Inked Ribbon Corp.*, the Board affirmed an ALJ decision that found no evidence to support the assertion made in the complaint that the respondent understood that a threat to go to the *Labor Department* (not *Labor Board* as here) for assistance of an employee’s grievance was understood as a threat to go to the Board. *Id.*

Contrary to Respondent’s position (at R. Br. at 3.), it is well established that an employee need not specifically reference the “National Labor Relations Board” in order for a statement by the employee about contacting the Board to be protected under the Act. Here, as of February 12, Finch learned of his employees’ threat through Kamalo was to go to the *Labor Board* for assistance with the group’s concern of current or future delayed paychecks. Kamalo reiterated his intent to seek assistance from the “Labor Board” directly to Finch. Next, Kamalo actually went to the local office at Region 28 of the Board in Phoenix, Arizona, where Kamalo filed his charge the very next day.

I find that in these circumstances, Kamalo’s reference to seeking assistance from the Labor Board is sufficient to bring such statement within the broad protections of Section 8(a) of

the Act. “[I]t is generally known that the Labor Board is the agency to which workers take their complaints.” *Goeman America, Inc.*, 314 NLRB 504, 508 (1994); *see also Hi-Craft Clothing Co.*, 251 NLRB 1310, 1317 (1980)(Same); *Overseas Motors, Inc.*, 260 NLRB 810, 813–814 (1982)(Same); *Book Covers, Inc.*, 276 NLRB 1488, 1492 (1985)(Same).

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III. Interrogation of Kamalo

Complaint paragraphs 4(a) – (c) and 5 allege that on about February 12, 2015, Respondent, by Finch, at Respondent’s facility, interrogated its employees about their protected, concerted activities regarding wages, working conditions, and terms of employment and about going to and pursuing remedies through the Board and that because of this conduct Respondent interfered with, restrained, or coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

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The test for determining whether questioning of an employee violates Section 8(a)(1) of the Act is whether it would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Grand Canyon University*, 362 NLRB No. 13 slip op. 1 (2015), citing *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975). Circumstances considered in evaluating the tendency to interfere include the (1) background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

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In applying the *Rossmore* considerations, I find that Finch’s February 12 interrogation of Kamalo was coercive given that Kamalo was questioned by Respondent’s owner/supervisor who made all decisions about hiring and firing employees alone in the supervisor’s office away from all other employees. Furthermore, it is clear that this was no casual, friendly or joking conversation as Finch started the meeting appearing upset when he spoke to Kamalo and questioned him repeatedly about what Finch had heard from other employees that Kamalo had considered going to the Board for assistance if Finch continued to delay employee paychecks. Rather than stop there with his alerting Kamalo that Finch knew that Kamalo had previously mentioned to other employees going to the Board which Finch’s tone of voice and mannerisms showed his being upset, Finch also told Kamalo that Finch believes that each employee should take one for the company and not complain about delayed paychecks or threaten or actually go to the Board for assistance else be subject to termination for not being a company employee.

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As such, I conclude that this conversation amounted to a coercive interrogation in violation of Section 8(a)(1) of the Act as Finch made it clear to Kamalo that Section 7 rights did not apply at Respondent’s facility and emphasized an employer’s ultimate threat, that he controlled Kamalo’s employment. The entire February 12 conversation established that Respondent’s interrogation was coercive and violated Section 8(a)(1) of the Act. *See Gelita USA Inc.*, 352 NLRB 406, 411 (2008)(Employer violated Section 8(a)(1) where it coerced employee where high management official with the Company, among other things, advanced no legitimate reason for her inquiries); *see also Hi-Craft Clothing Co.*, 251 NLRB 1310, 1317 (1980)(Employer violated Section 8(a)(1) where it coerced employees in their right to free access to the Board’s processes after they had threatened to go to the Labor Board).

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IV. Discharge of Kamalo

A. Section 8(a)(4) Violation

Complaint paragraphs 4(a), (d) – (f), 5, and 6 allege that on about February 12, 2015, Respondent, by Finch, discharged Kamalo because Kamalo engaged in protected, concerted activities regarding wages, working conditions, and terms of employment and about going to and pursuing remedies through the Board or because Respondent believed that Kamalo intended to contact or consult with the Board or file a charge with the Board and Respondent has been discriminating against employees for considering or intending to contact or consult the Board and file charges under the Act in violation of Section 8(a)(4) and (1) of the Act.

Section 8(a)(4) of the Act makes it unlawful, “to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act.” When an employer discharges an employee ostensibly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration— the protected activity of the employee or other employees—entered into the decision making process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the mixed motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee’s protected activity was a motivating factor in an employer’s adverse action. If the General Counsel meets that initial burden, the burden shifts to the employer to show it would have taken the same action even absent the employee’s protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate that it would have taken the same action in the absence of the protected conduct. And if the employer’s proffered reasons are pretextual—either false or not actually relied on—the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons, absent the protected activity. See *Alternative Energy Applications*, cited above, 361 NLRB No. 139, at slip op. 3, citing authorities. It has long been recognized that where an employer’s reasons are false, it can be inferred “that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Finally, a trier of fact may not only reject a witness’ story, but also find that the truth is the opposite of that story. *Pratt (Corrugated Logistics)*, LLC, 360 NLRB No. 48, slip op. at 11–12 (2014), and cases there cited.

Applying *Wright Line* here, I find that the General Counsel has clearly established that the employees’ protected activity on January 28, and January 30, was the motivating factor in Respondent’s decision to terminate Kamalo. There is no doubt, as set forth above, that Finch exhibited animus against Kamalo’s protected concerted activity while terminating him on February 12, 2015, and in fact terminated him for that very protected activity.

I also find that the General Counsel carried his burden of showing discriminatory motive. With respect to timing, the Board has held that where the discrimination occurs shortly after the discriminatee’s protected activities occurred and were known to the Employer, this represents

significant evidence of an unlawful motivation. Such coincidence is time between Employer’s knowledge of the employee’s protected activity and his discharge is strong evidence of unlawful motive for the discharge. *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995). Here, Finch met with Kamalo on February 12, and revealed to him for the first time Finch’s knowledge of Kamalo’s protected activity and terminated him that same day.

As set forth above, Respondent’s attendance and disciplinary policies for its employees were nonexistent and Finch readily admitted so as no employee had ever received written or formal discipline before February 12, 2015. To discharge Kamalo on February 12, in these circumstances suggests the reason for the discharge was not related to Kamalo’s work performance or attendance but because the discharge was discriminatorily motivated and related to Kamalo’s earlier protected activity and stated intention of seeking assistance from the Board. McAllister’s shoddy work performance had cost Respondent much more financial hardship than anything Kamalo had done. All of the employees missed work and used their cellphones while on the clock. In view of the timing of the disparate treatment discussed above, I conclude that the General Counsel has established conclusive evidence that a substantial or motivating factor in Kamalo’s discharge was his announced intention to seek assistance from the Board for the employees’ delayed paychecks.

Also, the Respondent’s animus toward the employee’s protected activity is amply demonstrated by the pretextual nature of its proffered reasons for Kamalo’s termination, its disparate treatment of Kamalo, and its shifting reasons for his discharge. I also find that the Respondent’s unlawful interrogation provides additional evidence of animus. *Atelier Condominium*, 361 NLRB No 111, slip op. at 5 (2014), and *R.J. Corman Railroad Construction*, 349 NLRB 987, 989 (2007).

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf’d. 705 F.2d 799 (6th Cir. 1982). Thus, if the evidence establishes that the reasons given for the Respondent’s discharge of Kamalo are pretextual as they are here, the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Rood Trucking, Co.*, 342 NLRB 895, 898 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). As stated above, I find that the evidence here establishes that the reasons for Respondent’s February 12 discharge of Kamalo are pretextual and that the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis in this case.

Moreover, once Finch discovered that Kamalo was encouraging his coworkers to consult the Board if their paychecks were ever again delayed, Respondent terminated him. I further find that the Respondent’s swift discharge of Kamalo was the product of its unlawful effort to muzzle Kamalo and ensure that any future threats to go to the Board with further paycheck delays did not lead to additional group action. An employer violates the Act when it acts to prevent future protected activity. *Parexel International, LLC.*, 356 NLRB No. 82, slip op. at 5, fn. 9 (2011). “After all, the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity.” *Id.* at slip op. at 5. I further find that in this

case the prevention of future discussions among employees about wages is closely connected to the specific allegations of the complaint.

In view of the overwhelming evidence here, the record does not support a finding that Respondent satisfied its substantial defense burden. See e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010), (when there is a strong showing of unlawful motivation, the respondent's defense burden is substantial).

Alternatively, I note that regardless of whether the Respondent's work performance and attendance policies allowed numerous absences, late arrivals, with or without prior notice, shoddy workmanship, or use of personal cellphones while on the clock, the Respondent failed to meet its burden of showing that the discharge of Kamalo was similar to the discipline of other employees who violated the work performance and attendance policies, sometimes in a more egregious manner than Kamalo, but did not engage in protected, concerted activity. I also note that the *Wright Line* standard does not require a showing of particularized animus toward the employee's specific protected activity. See *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enf'd. 801 F.3d 767 (7th Cir. 2015); *Encino Hospital Medical Center-Prime*, 360 NLRB No. 52, slip op. at 2, fn. 6 (2014).

Accordingly, the evidence does not establish that the Respondent would have discharged Kamalo based solely on his work performance issues even in the absence of Kamalo's protected concerted activity. Therefore, I find that the discharge of Kamalo was motivated by his protected concerted activity in violation of his rights under Section 8(a)(4) and (1) of the Act. Moreover, the discharge of Kamalo because he made known a decision to seek Board assistance on behalf of himself or for himself and others is an independent violation of Section 8(a)(4). See *Hi-Craft Clothing Co.*, 251 NLRB 1310, 1317 (1980)(Employer violated Section 8(a)(4) where employees discharged for threatening to go to the Labor Board); *Hoover Design Corporation*, 167 NLRB 461, 461–462 (1967).

B Section 8(a)(1) Violation

During the termination meeting on February 12, Finch told Kamalo that he should have first taken his delayed paycheck complaints to Finch as Respondent's owner and chief operating officer as a family member would before taking his complaints to the outside world and the Board. (Tr. 66.)

Section 8(a)(1) of the Act states:

It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Animus or antiunion motivation and the success of any threat are not essential elements in finding a violation of Section 8(a)(1) of the Act. The Board found in *American Freightways Co.*, 124 NLRB 146, 147 (1959):

Interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed.

The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. In *Public Service Co. of Colorado*, 301 NLRB 238, 241 (1991), it was found that the employer told a union steward that if he had to answer, “. . . all your petty first step grievances, I will not pay [Repsher].” The

Board affirmed the ALJ who found that the comment cast a chilling effect on the union steward’s pursuit of his duties and violated Section 8(a)(1) of the Act. Here, Finch’s statement to Kamalo amounted to telling Kamalo that Respondent would rather insist its employees come to management with their group concerns such as delayed paychecks and thus attempted to chill Kamalo in the exercise of his rights to consult or seek remedies at the Board in violation of Section 8(a)(1) of the Act.

Moreover, the record clearly establishes that in attempting to collect unpaid compensation in January 2015, employees were acting in concert for their mutual aid within the meaning of Section 7. That Respondent through Finch eventually discovered that the delayed paychecks and the intention to go to the Board were the subjects of such activities is equally apparent in this case. For example, Finch testified that as of February 12, he knew and questioned Kamalo about his discussions with Respondent’s employees and Kamalo’s intention to go to the Board if paychecks continued to be delayed or were further delayed in the future. I find that Kamalo’s threat to go to the Board triggered Finch’s decision to discharge him and was an integral part of the concerted activity demonstrating employee unwillingness to put up with delayed paychecks. Consequently, I further find that Kamalo’s discharge for his threat to go to the Labor Board also violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By calling Robert Kamalo into his office on February 12, 2015, to ask about his statement that he told other employees that they had the option of going to the Labor Board for assistance for their unpaid delayed paychecks, Respondent through Jayson Finch interrogated Robert Kamalo in violation of Section 8(a)(1) of the Act.

3. By discharging employee Robert Kamalo because of his protected concerted activities involving his mentioning to his fellow employees that they had an option to go to the Labor Board for assistance in connection for their delayed paychecks, the Respondent violated Section 8(a)(4) and (1) of the Act.

4. By discharging employee Robert Kamalo because of his protected concerted activities involving his mentioning to his fellow employees that they had an option to go to the Labor Board for assistance in connection for their delayed paychecks, the Respondent violated Section 8(a)(1) of the Act and interfered with, restrained, and coerced Robert Kamalo in the exercise of the rights guaranteed in Section 7 of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDIES

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist such practices and take certain affirmative action designed to effectuate the policies of the Act.

5 Specifically, having concluded that the Respondent is responsible for the unlawful suspension and discharge of employee Robert Kamalo, the Respondent must offer him immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Kamalo whole, with interest, for any loss
10 of earnings and other benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the
15 Respondent shall compensate Kamalo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall also be required to expunge from its files any and all references to the suspension and discharge, and to notify Kamalo in writing that this has been done and that the discharge will not be used against him in any way. The
20 Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended.¹⁰

ORDER

25 The Respondent, Red Devil Auto & Fleet Repair, LLC, Surprise, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating Respondent's employees because they mention to coworkers that they have an option to go to the Board for assistance in connection for their delayed paychecks;

30 (b) Unlawfully discharging or otherwise discriminating against Respondent's employees because they mention to coworkers that they have an option to go to the Board for assistance in connection for their delayed paychecks; and

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act:

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer employee Robert Kamalo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

5 (b) Make employee Robert Kamalo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

10 (c) Compensate employee Robert Kamalo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to Kamalo, it will be allocated to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify employee Kamalo in writing that this has been done and that the loss of employment will not be used against him in any way.

15 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (f) Within 14 days from the date of this order, post at its facilities in and around Surprise or Glendale, Arizona, copies of the attached notice marked “Appendix”¹¹. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees
25 are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these
30 proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2015.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. February 3, 2016

A handwritten signature in cursive script, reading "Gerald M. Etchingham".

Gerald M. Etchingham
Administrative Law Judge

10

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT you about your or other employees' discussions about working conditions, wages, pay schedules, or other terms of employment.

WE WILL NOT interrogate you because you engage in activities or make statements to other employees to the effect that you will go to the National Labor Relations Board for assistance for any delayed payment of a paycheck.

WE WILL NOT discharge you because you engage in activities or make statements to other employees to the effect that you will go to the National Labor Relations Board for assistance for any delayed payment of a paycheck.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Robert Kamalo immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges he previously enjoyed.

WE WILL make Robert Kamalo whole for the wages and other benefits he lost as a result of his discharge.

WE WILL expunge and physically remove from our files all references to the February 12, 2015 discharge of Robert Kamalo, notify him, in writing, that such action has been accomplished and that the expunged material will not be used as a basis for any future personnel action against him or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

RED DEVIL AUTO & FLEET REPAIR, LLC

(Employer)

Dated

By

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-146421 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.